No. 79-183

In the Supreme Court of the United States

OCTOBER TERM, 1978

WHITE AUTOMOTIVE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A22-A30) is not reported. The Board's decision and order (Pet. App. A12-A21) are reported at 235 N.L.R.B. No. 155. The Board's decision in the related representation proceeding (Pet. App. A1-A11) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A32-A33) was entered on May 7, 1979. The petition for a writ of certiorari was filed on August 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly overruled petitioner's objections to the conduct of a representation election and directed petitioner to recognize and bargain with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 4.

STATEMENT

1. On July 22, 1977, the Board's Acting Regional Director conducted a representation election among petitioner's production and maintenance employees (Pet. App. A1). There were 29 votes cast for the union (the United Auto Workers), 27 against it, and there was one challenged ballot (Pet. App. A2). Petitioner filed timely objections to the election, contending that the union's campaign had improperly influenced the outcome (Pet. App. A2).

The Acting Regional Director conducted an investigation, during which all parties were allowed to submit evidence. Petitioner contended that a union handbill distributed a week before the election had misrepresented a report of the Bureau of Labor Statistics (BLS) by stating that the government found that workers with a union earn $2.30 per hour more than a worker without a union (Pet. App. A4, A8-A9). According to petitioner, this sentence suggested that unionized workers earned $2.30 more per hour in wages alone, when in fact the $2.30 figure included fringe benefits (Pet. App. A8-A9). Petitioner also contended that it was unable to respond to this alleged misrepresentation because, although it learned by telephoning BLS four days before the election that the quoted figure included fringe benefits, it was unable to obtain a copy of the report until after the election (Pet. App. A9). The Acting Regional Director concluded that the union's statements were not misrepresentations, since "earnings in normal parlance may include fringe benefits, and mere use of alternate meanings of words to that which [petitioner] would have selected is not objectionable" (*ibid.*). The Director also concluded that petitioner could have responded to any ambiguity it perceived in the handbill, since it had learned how the $2.30 figure had been calculated four days before the election, and admitted having held meetings with employees at which wages and fringe benefits were discussed (*ibid.*).

Petitioner further contended that a second union handbill headlined "Guarantee!" had falsely stated that "the UAW 'cannot' and 'does not' fine UAW

members," when in fact the union's constitution specifically empowers the union to fine its members (Pet. App. A4, A9).[1] Petitioner admitted that it had received a copy of this handbill on July 15, a week before the election, and had distributed its own leaflet in response. Petitioner's leaflet rebutted the union's statement by quoting the union's constitution, offering to show the constitution to employees, and asking, "Why did the union lie to you?" (Pet. App. A9, A26). Petitioner contended, however, that its response was ineffective because employees would not likely believe an employer's statements about the contents of the union's constitution. The Director rejected this argument (Pet. App. A9, A10).

The Acting Regional Director certified the union as the employees' bargaining agent (Pet. App. A1-A11). The Board denied petitioner's request for review of the Director's decision and certified the union (Pet. App. A15). Petitioner refused to bargain, and in the subsequent unfair labor practice proceeding the Board held that the refusal violated Section 8(a)(5) and (1) of the Act. The Board ordered petitioner to bargain with the union (Pet. App. A16-A21).

2. The court of appeals enforced the Board's order in an unpublished order (Pet. App. A22-A30). The court noted (Pet. App. A25) that, under

[1] The union contended that the statement referred to the international union, which does not fine members, although the local union may. The Acting Regional Director found it unnecessary to resolve this dispute (Pet. App. A9-A10).

the test enunciated in *Hollywood Ceramics*, 140 N.L.R.B. 221, 224 (1962), only "a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party * * * from making an effective reply" is grounds for setting aside a representation election. The court agreed with the Board that petitioner had not shown that the union's leaflets contained misrepresentations and that, in any event, petitioner had an opportunity, which it exercised, to make an effective reply (Pet. App. A26-A29).

Concerning the "Guarantee" the court stated, "[w]e find it hard to believe that any employees would understand the 'Guarantee!' to be anything other than a campaign document in an eye-catching format" (Pet. App. A26). Concerning the wage comparison, the court noted that there was "no allegation that the BLS figures are themselves misleading or that the Union reported them incorrectly" (Pet. App. A29 n.6), and concluded that "[w]e cannot characterize the manner in which the Union described the BLS report as a misrepresentation, although it could be considered ambiguous" (Pet. App. A28). The court further noted that petitioner had the opportunity "to clarify the ambiguity" (*ibid.*).

Finally, the court rejected petitioner's argument that factors such as the closeness of the vote and petitioner's planned move and expansion of its workforce required that the election be set aside. The court held that "[o]n the facts of this case, even

considering these additional factors, we cannot say that the Board was wrong in its conclusion that the election results should stand" (Pet. App. A30).[2]

ARGUMENT

Petitioner agrees (Pet. 8-9) with the Board and the court of appeals that the applicable legal principles for determining whether alleged misrepresentations in a campaign require setting aside an election are those set forth in *Hollywood Ceramics, supra.* The only issue presented by the petition is whether the Board reasonably concluded that the union's leaflets did not contain material misrepresentations, and that, in any event, petitioner had an opportunity for effective reply. Such an issue, which turns on the particular facts of the case, does not warrant further review. Moreover, for the reasons stated in the court of appeals' opinion (Pet. App. A26-A30), the Board's conclusions were reasonable.[3]

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[2] The court denied petitioner's motion for recall of mandate and a stay. Petitioner then filed a motion for a stay with Mr. Justice Stevens, which was denied on August 14, 1979.

[3] Contrary to petitioner's assertion (Pet. 11), the decision below does not conflict with that of any other court of appeals. In each of the cases cited, as in the present case, the court acknowledged that misrepresentations regarding wages can affect election results, but then examined the facts of the case to determine whether misrepresentations had actually been made, whether the employer had an opportunity to respond, and whether any misrepresentation had a probable impact on the election.

Nor, contrary to petitioner's contention (Pet. 11-12), does the decision below depart from a line of cases recognizing

There is no merit to petitioner's contention (Pet. 9-10) that, in light of *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969), the decision below allows unions to make predictions as to post-election benefits, while employers "must stand mute." As the court of appeals noted (Pet. App. A29 n.7), the union's "prediction" here was merely the factual comparison of average earnings for union and non-union workers, using figures quoted from a BLS report; a company statement informing employees of the ambiguity it perceived in the union's presentation of the BLS figures would not have amounted to a prediction of the economic consequences of unionization within the meaning of *Gissel.* Moreover, *Gissel* did not preclude an employer from making "prediction[s] as to the precise effects he believes unionization will have on his company" so long as he does not threaten retaliatory action against employees as part of his economic prediction (*Gissel, supra,* 395 U.S. at 618).

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that employers cannot respond effectively to a union's statements about its own *contracts,* since the statement challenged here involved the union's *constitution.* Petitioner had a copy of the constitution and, indeed, had quoted from it in a letter to the employees.

Finally, the question raised by petitioner (Pet. 13) whether the burden of proof should shift to the General Counsel "where the Employer demonstrates that the campaign was tainted by material misrepresentations" is not presented here, since, as the Board and the court below agreed (Pet. App. A9, A10, A26-A27, A29), petitioner had not shown that the election campaign was so tainted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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